

Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2003: July 1, 2002 to June 30, 2003

Supreme Court Cases:

1. Coffey v. Waldinger Corporation, 11 Neb. App. 293, 649 N.W. 2d 197 (2002)

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

GOING AND COMING RULE

The Supreme Court found that the compensation court did not err in finding plaintiff's fatal accident arose out of and in the course of employment.

Plaintiff was walking from a parking lot across the street to the worksite when he was killed by an automobile. The lot was restricted to onsite workers and was not open to the public. Employees were required to provide vehicle information, and cars that did not belong in the lot would be towed. The employer stored construction materials in the lot and employees would have to cross the street to retrieve those materials when needed.

Defendant argued that the accident did not arise out of and in the course of employment because plaintiff was on his way to work and was not yet on the clock when the accident occurred. In addition, defendant argued that plaintiff was willfully negligent because he jaywalked, rather than crossing the street at the stoplight.

Neb. Rev. Stat. §48-101(Reissue 1998) compensates injuries caused to an employee by an accident arising out of and in the course of employment. The phrase "arising out of" describes the accident and its origin and whether it resulted from the risks arising within the scope of the employee's job. The phrase "in the course of" refers to the time and place of the accident. In order to recover for an injury, a claimant must establish by a preponderance of the evidence that both conditions exist. *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W. 2d 283(1998). Under *La Croix*, an injury sustained by an employee while going to or from work, at a fixed place of employment, does not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury.

In this case, the Supreme Court found that by providing parking across the street from the worksite, the employer created a condition under which employees would encounter hazards while traveling to the premises where they worked. Therefore, there was a distinct causal connection between the employer's encouragement to use the lot and the occurrence of the injury. The court also stated that the plaintiff was at the jobsite within a reasonable time prior to his starting time. Therefore the trial court did not err in finding that plaintiff was in the course of his employment at the time of the accident. Finally, the trial court did not err in finding that plaintiff was not willfully negligent by jaywalking because all employees, including foremen, crossed directly across the street from the parking lot.

2. Harsh v. Monfort, 266 Neb. 82, 662 N.W. 2d 574 (2003)

EXCLUSIVE REMEDY

EMPLOYER NEGLIGENCE

SUBROGATION

The Supreme Court affirmed the District Court determination that the Act relieves the employer from liability, including actions filed by third parties. As a result, the employee's petition was dismissed without leave to amend.

The employee was injured in the course of employment by a mixer produced by the manufacturer. The employee filed a third-party claim against the manufacturer and included the employer as a defendant. The case was settled and the manufacturer then sought indemnity from the employer on the basis of negligence, strict liability, unjust enrichment, and implied contract of indemnity. The manufacturer claimed that it was not involved in the design, placement, maintenance, or installation of the mixers, that the mixers were modified by the employer, and that the employer did not follow or implement safety rules.

The manufacturer's claim was based on a theory that it could bring an action for contribution against the employer as an intentional tort-feasor. The employer argued that Neb. Rev. Stat. §48-148 bars any action by a third-party against an employer for either indemnity or contribution. The Supreme Court agreed and declined to recognize an exception to the exclusive remedy under §48-148. See *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W. 2d 652 (1976). The Court noted that the Workers' Compensation Act provides the exclusive remedy by the employee against the employer for any injury, including intentional acts of an employer. *Abbott v. Gould*, 232 Neb. 907, 443 N.W. 2d 591 (1989).

The manufacturer also argued that the implied indemnity doctrine is an exception to the exclusive remedy. The Supreme Court disagreed, stating that there is not an implied indemnity exception to the exclusive remedy provision outside the existence of a special relationship or an express contract of indemnification. Under the latter, an employer has explicitly agreed to reimburse a third party for payment to an injured employee. A special relationship includes principle and agent, bailor and bailee, lessor and lessee, or a situation giving rise to vicarious liability. The relationship between vendor and vendee is not included. *Ramos v. Browning Ferris Industries*, 103 N.J. 177, 510 A. 2d 1152 (1986). In this case, the Supreme Court found that the relationship between the employer and manufacturer was that of vendor and vendee. Therefore, there was no contract of indemnity and the manufacturer's argument failed.

The Supreme Court did not address whether comparative negligence of an employer could be raised as a defense to an action between an injured employee and a third party. It was res judicata in this case because it could have been litigated in the action between the employee and manufacturer.

3. Jackson v. Morris Communications Corporation, 265 Neb. 423, 657 N.W.2d 634 (2003)

RETALIATORY DISCHARGE

PUBLIC POLICY

The Supreme Court reversed the district court's order of dismissal for failure to state a cause of action for retaliatory discharge, and remanded for further proceedings.

Plaintiff sustained an injury to her wrist arising out of the scope and course of her employment while operating a labeling machine. She reported the injury and received conservative medical care. Plaintiff was unable to perform some of her required duties because of the injury, therefore her pay and duties were adjusted. Her supervisor began logging alleged problems with her performance and she was subsequently terminated. Several months later, it was determined that plaintiff's wrist was fractured. Because of the delay in treatment and because plaintiff had continued to perform her duties, she suffered bone loss, requiring a full fusion of her wrist. Plaintiff filed a petition alleging that she was discharged because she was injured and had filed a workers' compensation claim.

The district court dismissed plaintiff's claim for failure to state a cause of action, stating that wrongful discharge in retaliation for filing a workers' compensation claim is not yet recognized by Nebraska law. The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). The Supreme Court disagreed. The Court found that there is a public policy exception to the at-will employment doctrine under which an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Malone v. American Bus. Info.*, *supra*. Termination of an employee for filing a workers' compensation claim falls within the public policy exception to the at-will employment doctrine. The Court stated as follows: "The Nebraska Workers' Compensation Act was promulgated to serve an important public purpose, and a rule which allows fear of retaliation for the filing of a claim undermines that policy. We are convinced that the unique and beneficent nature of the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception."

4. Lopez v. IBP, Inc., 264 Neb. 273, 646 N.W. 2d 628 (2002)

TIME FOR APPEAL

NEGLIGENCE -- PUBLIC OFFICERS AND EMPLOYEES

The Supreme Court affirmed the review panel's order dismissing defendant's appeal for lack of jurisdiction because it was not timely filed.

The trial court awarded plaintiff benefits in a decision dated October 26, 2000. Defendant had until November 9, 2000 to file its appeal. On November 8, 2000, defendant's counsel sent its appeal via UPS next day air delivery addressed to the Nebraska Workers' Compensation Court at the State Capitol Building. UPS was not able to deliver the package on November 9, 2000 because the Court was temporarily relocated to another building. UPS did not actually deliver the application to the relocated address until November 13, 2000.

The review panel dismissed defendant's appeal stating it did not have jurisdiction because the application for review was not timely filed. Defendant then appealed to the Court of Appeals. The Supreme Court moved the case to its docket under its power to regulate the Court of Appeals' caseload.

Defendant argued that the review panel erred in determining that the delivery of the application for review to the State Capitol Building on November 9, 2000 was not sufficient to confer jurisdiction upon the review panel. Defendant relied on the theory that its application should not be considered untimely when the delay in filing resulted from the failure of the Clerk of the Workers' Compensation Court to be at his or her statutorily required location during normal business hours.

The Supreme Court disagreed, stating the trial judge's award was binding unless defendant could establish: (1) that it was free from neglect and (2) that it was prevented from having its appeal docketed within the statutory period through the failure or neglect of the Clerk of the Workers' Compensation Court. In the instant case, defendant was not free from neglect because its agent, UPS, learned at 9:53 a.m. on November 9, 2000 that the Clerk had relocated. UPS had the entire day to locate the Clerk's office, but inexplicably, UPS did not discover the location until 5:29 p.m. Citing *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930), and *Drier v. Knowles Vans, Inc.*, 144 Neb. 619, 14 N.W.2d 222 (1944), the Court reasoned that defendant selected the agent and placed the burden upon that agent of filing the application on time. Therefore the negligence of the agent was the negligence of the appellant.

Additionally, the Court found that sufficient notice was given by the Workers' Compensation Court of its relocation because of written notices sent out for weeks before and after the move, and notice posted on the Workers' Compensation Court's internet web site. The telephone numbers also remained unchanged during the relocation.

Because the Supreme Court found that defendant was not free from neglect, it was unnecessary to address the assertion that the Clerk of the Workers' Compensation Court was negligent.

5. Zavala v. ConAgra Beef Co., 265 Neb. 282, 655 N.W. 2d 692 (2003)

VOCATIONAL REHABILITATION

STACKING OF MEMBER AND NONMEMBER IMPAIRMENTS

REASONED DECISION

The Supreme Court affirmed the Court of Appeals' holding that stacking of a member impairment with a whole body impairment is permissible in determining loss of earning capacity, and that the question of vocational rehabilitation should be reconsidered by the trial court in light of this determination.

The trial court awarded plaintiff permanent partial disability benefits for her right upper extremity and whole body impairments plus vocational rehabilitation benefits. The court-appointed vocational rehabilitation counselor opined that plaintiff was an odd lot worker and permanently totally disabled. A rebuttal vocational rehabilitation opinion criticized the court-appointed counselor's methodology of combining or "stacking" the member and nonmember injuries. The trial judge found the court-appointed counselor's opinion was rebutted. The review panel affirmed the award regarding whole body and upper extremity impairment, but reversed the award of vocational rehabilitation because plaintiff was able to perform her assigned work. In addition, the review panel made a finding that stacking is impermissible.

The Court of Appeals disagreed with the review panel and concluded that stacking is, in fact, permissible. Because the trial judge appeared to have assumed that stacking is not permitted, the Court of Appeals affirmed the review panel's reversal regarding vocational rehabilitation benefits. Moreover, the trial judge failed to explain the basis of her finding that the court-appointed counselor's opinion was rebutted as required by Rule 11 of the compensation court's Rules of Procedure.

The Supreme Court agreed with the Court of Appeals' determination that stacking is permissible under the Workers' Compensation Act. Section 48-121 does not specifically address how compensation is to be established when a worker suffers both a scheduled and unscheduled injury as the result of a single accident. The Court noted that the Act does not encompass all potential factual situations that may occur. Relying on *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991), the Court found that an exception to 48-121(3) occurs when a scheduled injury results in an unusual or extraordinary condition. The Court presumed that the Legislature has acquiesced to that interpretation because no amendments were made. In the instant case, the Court elaborated stating that if the scheduled member injury adversely affects the worker such that a loss of earning capacity cannot be fairly assessed without such consideration, the impact of the scheduled member may be considered. Therefore, the Court of Appeals correctly remanded the issue of plaintiff's entitlement to vocational rehabilitation in light of the decision on stacking.

Finally, the Supreme Court reversed the Court of Appeals regarding the trial judge's compliance with Rule 11. The Court concluded that the record contained sufficient evidence to support the trial judge's factual finding that plaintiff was not an odd lot worker as required by Rule 11.

Court of Appeals Cases (Designated for Permanent Publication):

1. Brummer v. Vickers, Inc., 11 Neb. App. 691, 659 N.W.2d 838 (2003)

TEMPORARY TOTAL DISABILITY

SUITABLE EMPLOYMENT

VOCATIONAL REHABILITATION

PAYMENT IN LIEU OF COMPENSATION

The Court of Appeals affirmed the review panel's decision affirming in part and reversing in part the trial court's decision, remanding the issue of whether plaintiff was entitled to temporary total disability benefits from January 6, 2001 to April 4, 2001.

Plaintiff returned to work for defendant in a modified job with restrictions until she was laid off on January 5, 2001. The trial court found that returning plaintiff to a modified job with restrictions was "voluntary" vocational rehabilitation, entitling her to temporary disability for that period of time. She reached maximum medical improvement on April 4, 2001. The trial court based its decision to award temporary total disability benefits from January 6 until April 4, 2001 on whether plaintiff was in vocational rehabilitation prior to January 5, 2001. The review panel found that the trial court's reasoning was clearly wrong in finding plaintiff was participating in vocational rehabilitation prior to January 5, 2001. The review panel remanded the case to the trial court for a determination of whether plaintiff was entitled to temporary total disability benefits from January 6, 2001 to April 4, 2001, ordering the trial court not to use vocational rehabilitation as a reason for awarding temporary disability benefits. The Court of Appeals held that there were no factual findings by the trial court regarding this issue. Therefore, there was nothing for that Court to review, and the review panel did not err in remanding the temporary disability issue to the trial court.

The Court of Appeals also affirmed the compensation court's finding that the employer was not entitled to a credit against temporary total disability benefits owed by paying plaintiff a severance package. Plaintiff had signed a release in connection with the severance payment. However, such agreement was not in compliance with the compensation court's settlement requirements. In addition, there was no evidence to show defendant intended for the severance package to be in lieu of workers' compensation benefits, a factor which may be considered in determining whether credit should be given for money paid. *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954). Based on the facts of the case, as well as case law from other jurisdictions, the Court of Appeals concluded that defendant could not take credit for the severance payment.

Regarding plaintiff's entitlement to vocational rehabilitation, the Court of Appeals held that the review panel did not err in remanding this issue. Defendant contended the plaintiff was "capable of working" from the time she returned to a modified position and at all times thereafter. The trial court had based its decision to deny plaintiff vocational rehabilitation on the fact that defendant had already complied with the requirements of vocational rehabilitation by providing a modified job with restrictions. The review panel concluded that the modified position did not constitute participation in vocational rehabilitation. As there were no factual findings on plaintiff's ability to engage in suitable employment after she reached maximum medical improvement, the review panel properly remanded the case.

Finally, the review panel could not determine whether the employer owed attorney fees for

failure to obtain a reduction in liability because some of the issues were remanded to the trial court.

2. Mabile v. Drivers Management, Inc., 11 Neb. App. 765, 660 N.W. 2d 537 (2003)

PLAIN ERROR

SUMMARY JUDGMENT

RES JUDICATA

The Court of Appeals reversed and remanded the decision of the review panel, which reversed an order of dismissal without prejudice.

The trial court granted defendant's oral motion for summary judgment after four stipulations were read into the record. Plaintiff made no objection to the oral motion for summary judgment. The trial judge handwrote the words "without prejudice to the refiling of the same" at the end of the order of dismissal.

Defendant filed an application for review alleging the trial court erred in dismissing plaintiff's petition without prejudice. Defendant sought modification of the order to delete the "without prejudice to the refiling of the same" notation, or to remand to the trial court for an order dismissing the petition with prejudice.

The review panel reversed the trial court finding that it was error to consider defendant's oral motion for summary judgment. The review panel cited *Walkenhorst v. Apolius*, 172 Neb. 830, 112 N.W.2d 31 (1961) which held "[a] motion for summary judgment does require compliance with all statutory requirements, and this compliance would preclude an oral motion."

Defendant argued to the Court of Appeals that it was error for the review panel to consider the trial court's summary judgment procedure since plaintiff did not object to the oral motion, thus waiving any defect in procedure. Moreover, plaintiff did not appeal the dismissal of the petition, file an application for review with the review panel, or assign any errors on appeal. The Court of Appeals disagreed, holding that Rule 16C(1)d of the compensation court's Rules of Procedure clearly gives the review panel the authority to note plain error at its discretion.

Defendant also argued the review panel erred in finding that the trial court's summary judgment procedure was erroneous. The Court of Appeals agreed, holding plaintiff waived any objection to defendant's oral motion and lack of notice, i.e., plaintiff joined in a discussion with the trial judge and defendant about plaintiff's inability to gather evidence regarding causation. Furthermore, plaintiff did not object to the trial judge taking a recess to review an exhibit related to the oral motion.

Finally, defendant argued the review panel erred in failing to find that any infirmities in the trial court's summary judgment procedure were harmless error, as defendant would be entitled to an order of dismissal after a full trial because medical causation was lacking. The Court of Appeals held that it was unnecessary to address the issue of harmless error in light of the conclusion that plaintiff waived any objection to the oral motion and lack of proper notice. The Appeal Court remanded the case to the review panel to affirm the trial judge's opinion as modified to make the dismissal of the plaintiff's petition with prejudice. The Court reasoned that dismissal with prejudice was necessary since summary judgment is considered a judgment on the merits rather than a dismissal on procedural grounds for purposes of res judicata. The doctrine of res judicata bars relitigation of any right, fact or matter directly addressed or necessarily included in a former adjudication if the former judgment was rendered by a court of competent jurisdiction, the former judgment was a final judgment, the former judgment was on the merits, and the same parties or their privies were involved in both actions.

3. Mihm v. American Tool, 11 Neb. App. 543, 664 N.W.2d 27 (2003)

JUDICIAL BIAS

RECUSAL

The Court of Appeals affirmed the review panel's reversal of the trial judge's decision and remanded the case for a new trial before a different judge of the workers' compensation court.

The trial judge awarded plaintiff benefits after finding he suffered an injury in the course of his employment with defendant. The trial judge began the trial by making his own record regarding specific "facts" about defendant's ownership and financial status and the "real danger" that the plant would close, even though he also stated that he would consider the general labor market in assessing disability. Defendant appealed, claiming that the trial judge should have recused himself for making comments at the outset of trial before any evidence had been produced. The Court of Appeals affirmed the review panel's decision to reverse and remand the case for a new trial, holding that the judge's comments indeed created the appearance of partiality and prejudgment. "A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown." *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

4. Noordam v. Vickers, 11 Neb. App. 739, 659 N.W.2d 856 (2003)

LOSS OF EARNING CAPACITY EVALUATION

REBUTTABLE PRESUMPTION

The Court of Appeals affirmed the findings of the trial court and review panel regarding the application of the rebuttable presumption of correctness set forth in §48-162.01(3).

The vocational rehabilitation counselor submitted three reports regarding plaintiff's loss of earning capacity. The first report was based on a rating to a scheduled member and was not an issue in the case. The second report was based on the physician's restrictions and provided a loss of earning capacity of 15 percent. The third report was based on a functional capacity evaluation and provided a loss of earning capacity of 0 percent. The trial court stated that it was "unaware of any statute, court rule or case law that requires that the loss in earning capacity report that is prepared last in time is summarily entitled to a rebuttal [sic] presumption of corrections [sic] when there are numerous reports all prepared by the same court appointed vocational counselor, involving different factual analysis" and found that plaintiff suffered a 15 percent loss in earning capacity.

Defendant, citing *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999), argued that the multiple opinions should be looked at as a process or progression, and that the final report which provided a 0 percent loss of earning capacity was entitled to the rebuttable presumption under §48-162.01(3). However, the Court of Appeals found that the counselor's reports were independent of each other and were based on different sets of facts, rather than reflecting a process of recovery.

The Court of Appeals agreed with the trial court and stated that when a vocational rehabilitation counselor submits multiple reports that are determined to be written not because the process of recovery was incomplete from the time a prior report was written, but because the counselor gives differing opinions based on different factual scenarios, it is up to the trial court to make factual findings to determine which report should be given the rebuttable presumption. The record contained evidence to support the trial court's conclusions; therefore, the trial court did not err when it found the rebuttable presumption applied to the second report.

5. State of Nebraska v. Soto, 11 Neb. App. 667; 659 N.W.2d 1(2003)

DEPENDENCY

REASONED DECISION

RULES OF DISCOVERY

The Court of Appeals affirmed the holding of the trial court and review panel, but relied on different grounds in affirming the decision.

The decedent was killed as a result of a work-related accident while employed by the State of Nebraska. At the time of his death, the decedent was married and had three stepchildren and two natural children. The state filed a petition seeking a determination of the dependency of the widow and stepchildren.

The court received into evidence unanswered requests for admission served on the widow and stepchildren, which, if admitted, would have indicated that they were not dependents. The trial judge granted the widow and stepchildren's motions to file answers out of time, in which they denied each request for admission. The trial judge stated that the compensation court is not bound by the usual rules of evidence or procedure. Therefore, the failure to answer a request for admission within 30 days did not require the court to find those facts admitted.

The trial court went on to find that the widow and three stepchildren were dependents and entitled to benefits. The Court of Appeals agreed that the stepchildren had met the requirements of §48-124, which required them to prove that they were actually dependent on the decedent. The stepchildren had been living with the decedent since May 1998. And even though two of the stepchildren were employed part-time at the time of the decedent's death, the evidence showed that their earnings were spent on personal items. Living expenses such as rent, utilities, and groceries were paid by the decedent.

Regarding the trial court's finding that the compensation court is not bound by the Nebraska Rules of Discovery, the Court of Appeals first cited Rule 4 of the Nebraska Workers' Compensation Court Rules of Procedure. That rule states discovery ". . . shall be pursuant to the Nebraska Discovery Rules for all civil cases promulgated by the Nebraska Supreme Court." Nevertheless, the Court of Appeals found that the trial court correctly allowed the widow and stepchildren to withdraw their admissions and file substitute answers. Under Rule 36 of the Nebraska Rules of Discovery, the trial court is given the discretion to allow a moving party to withdraw or amend admissions as long as the party who obtained the admission is not prejudiced. In this case, the state was not prejudiced. It had the opportunity to cross-examine all witnesses and it failed to seek other procedural remedies. Therefore, the trial court's ruling was affirmed.

Finally, although the evidence upon which the trial court relied in finding the stepchildren to be dependent was "minimal," the Court of Appeals held that the trial judge rendered a reasoned decision as required by Rule 11 of the Workers' Compensation Court Rules of Procedure. The Court of Appeals pointed out that this case did not involve numerous medical records and conflicting medical opinions. Rather, the evidence upon which the trial court relied was readily identifiable in the record, and for the most part, uncontradicted. Therefore, the factual findings made by the trial court were not disturbed on appeal as they were not clearly wrong.

6. Walsh v. City of Omaha, 11 Neb. App. 747, 660 N.W.2d 187 (2003)

MANAGED CARE PLAN

MEDICAL EXPENSES

The Court of Appeals affirmed the compensation court's decision that the medical expenses from physicians' treatment should not have been denied solely because the acceptance of the managed care plan came after treatment had begun.

The plaintiff was involved in an accident arising out and in the course of his employment. After the accident, he informed defendant that he wanted to treat with physicians who were not participating in defendant's court-approved workers' compensation managed care plan. Plaintiff began treatment, and defendant sent repeated requests to the nonparticipating physicians asking for their acceptance or denial of the managed care plan. The physicians did not respond to any of defendant's requests. Defendant sent a letter to plaintiff's counsel informing him that the medical bills from these physicians would not be covered by workers' compensation because the physicians had not agreed to comply with the managed care plan. After the physicians had provided treatment and performed surgeries on plaintiff for over a year, they did fax letters to defendant indicating that they accepted the managed care plan. The trial court found that the medical expenses from the physicians should not have been denied simply because the acceptance of the managed care plan came after treatment had begun and surgical procedures were performed.

Neb. Rev. Stat. §48-120(9) and §120.02(2)(h) allow an employee who is covered under the employer's workers' compensation managed care plan to receive medical treatment from a nonparticipating physician if the physician agrees to comply with all the rules, terms, and conditions of the plan. The Court of Appeals held that a nonparticipating physician's agreement to comply with a managed care plan can be obtained at any time while the physician is treating an employee. Once the physician agrees to comply with the plan, the employer is obligated to pay for all the medical expenses from that physician. No statute or rule of the compensation court prohibits a retrospective acceptance of the managed care plan by the physicians. However, the Court noted that an employee takes a risk by beginning and continuing treatment with a nonparticipating physician who has not agreed to comply with the managed care plan. If the physician never agrees to comply with the plan, none of the medical expenses incurred with that physician will be covered by workers' compensation.